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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 221

WALTER J. HICKEL, SECRETARY OF THE INTERIOR, PETITIONER

v.

THE OIL SHALE CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

1. The respondents' principal emphasis in their main brief is on the proposition that the 1928–1931 administrative decisions are now properly before this Court on *direct* review. But in their opposition to the government's petition for a writ of certiorari in this Court they correctly stated that "the only issue passed upon by the district court and the court of appeals" was whether those "decisions were rendered in excess of the subject matter jurisdiction of the Department." Brief in Opposition for Respondents The Oil Shale Corp. and Brown, pp. 20–21. The only questions presented by the government in its petition were the issue of subject matter jurisdiction, and the subsidiary

question whether *Virginia-Colorado*[1]—on which resolution of that issue depends—was correctly decided. Pet. 2, 15; Reply 2–3. Of course, much of respondents' argument goes to the question whether *Virginia-Colorado* should be overruled or limited, and as such is entirely responsive; but the direct review proposed is a ground not passed upon by the courts below.

A petition for direct review made over thirty years after the proceeding sought to be reviewed is so extraordinary that it would seem no showing of prejudice need be undertaken. See *Wetzel* v. *Minnesota Railway Co.*, 169 U.S. 237; *Russell* v. *Todd*, 309 U.S. 280; *Davidson* v. *Grady*, 105 F. 2d 405, 408 (C.A. 5); *Gersten* v. *United States*, 364 F. 2d 850, 852 (Ct. Cl.). In any event, it is not necessary to show specific reliance on the particular decision invalidating the claims in order to establish an equitable basis for denying direct review. There is the wholly separate factor—equally a form of "prejudice" to the government, justifying denial of direct review—that the passage of years has obliterated much of the evidence by which the claims might now be judged. *Russell* v. *Todd*, *supra*, 309 U.S. at 287. It was in anticipation of this important consideration that the proceedings were brought when they were. *The Federal Shale Oil Co.*, 53 I.D. 213, 216. The very volume of those proceedings, in addition to substantial documentary evidence (A. 70–78; Supp. 15, 25; *Federal Shale Oil Co.*, *supra*, 53 I.D. at 215), makes clear that only assessment work issues were raised in the *Virginia-Colorado* proceedings.

[1] And, if required, *Krushnic*. Pet. Br. p. 48, n. 21.

Moreover, while no statute of limitations *now* applies, one arguably did in the years prior to 1962. Until that year, jurisdiction over the Secretary could have been obtained only in the District of Columbia, where a three-year statute of limitations applied to all claims not otherwise provided for. 12 D.C. Code 201. That time had already run, as to all of the claims in this case, before the June 3, 1935 decision of this Court in *Virginia-Colorado.* Supp. 112, 117, 124, 132, 137, 143. Even if not directly applicable, compare *United States ex rel. Arant* v. *Lane,* 249 U.S. 367, it provides some basis for determining when laches has occurred. *Russell* v. *Todd, supra,* 309 U.S. at 288–289. A lapse of less than seventeen months was involved in *Coleman* v. *United States,* 363 F. 2d 190, 196 and n. 5 (C.A. 9), adhered to on rehearing, 379 F. 2d 555, reversed on other grounds, 390 U.S. 599.

Finally, while TOSCO insists that its predecessors in interest in the Bute, Atlas and Camp Bird claims were under no obligation to exhaust administrative remedies before perfecting an appeal from the default judgments entered against them—and therefore that TOSCO, having bought their rights, may take such an appeal now [2]—it is striking that the other claimants

[2] TOSCO purchased its interests in the Bute, Atlas and Camp Bird claims after the initial assertion of the assessment work cancellation grounds for refusing patent in 1962. Supp. 54–55, 67, 68, 75, 80. If the Secretary acted without subject matter jurisdiction in the 1930's, its purchase was of land rights (the oil shale locations) which, whether or not invalid for other reasons, the Secretary's action had not affected. If he acted within his subject matter jurisdiction, but in error, however, its purchase was only of a chose in action—the claim to relief

did respond and resist the Department's actions. Compare Supp. 111, 112, 117, 124 with Supp. 129, 135–136, 140–141. In good part, the distinction between "collateral" and "direct" review draws on the fact that failure to respond to judicial or administrative process or decision is more likely to signify acquiescence or abandonment of claim than to show a simple concession of factual issues in order to test out legal questions in a higher court. TOSCO's implicit hypothesis that the claimants who subsequently quitclaimed their interests to Mr. Ertl for pennies per acre were merely waiting to see what this Court would decide in *Virginia-Colorado* is thus questionable at best. To permit one who does not even respond to process to challenge the legal as well as the jurisdictional basis of administrative action even after the fact, would be to permit avoidance of the obligation of response to the agency in a significant number of cases, and to facilitate

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from the error and reinstatement of the claim. Congress has specifically provided that there can be no assignment of claims, 31 U.S.C. 203, or contracts, 41 U.S.C. 15, involving the United States except under specified special circumstances of which this does not appear to be one. Indeed, in this context, application of the forfeiture technique to secure the interests of co-owners who have not contributed to assessment work appears equally suspect. If the claims were effectively cancelled by the Secretary, however erroneously, there would be not only no requirement, but no right to perform assessment work upon them.

Of course, respondents argue that the Secretary's actions after *Virginia-Colorado* did restore the claims. But that is a contention which they do not ask this Court to reach now, and which will be open on any remand. And if that contention is resolved in respondents' favor, it will no longer be necessary to entertain their claim to direct review.

sharp practice with claims as to which the real reason for non-response was either abandonment-in-fact, or acquiescence in legal principles the agency had the power to decide.

Thus, we do not believe review on non-jurisdictional legal issues is available to respondents at this time. But even if they are entitled to review unless the government can show an impediment in the nature of laches, the question whether such an impediment exists was never passed on below. If necessary, it should be remanded to the lower courts rather than decided for the first time in this Court.

2. While we did characterize our reading of *Virginia-Colorado* as "*somewhat* tortuous" as compared to outright overruling (Br. p. 47; emphasis added), that reading has one virtue which respondents' discussion entirely lacks: it gives some content to the statutory requirement of maintenance. Section 37 of the Leasing Act did not, after all, save existing valid claims in an absolute sense; it saved them only if they were "thereafter maintained." 41 U.S.C. 193. Whether or not it was a sensible conclusion in terms of prior mining law, this Court found that the *Virginia-Colorado* claims were being maintained because the claimants had responded to the Secretary's process with an offer to resume assessment work. 295 U.S. at 646. That offer fully distinguishes most if not all of the claims involved in the present cases.[3]

[3] In particular, there was a complete failure of response regarding the Bute, Atlas and Camp Bird claims, which represent 13,760 acres, or about 75 percent of the area subjected to the cancellations involved in this case. Supp. 61, 70, 76, 82, 90, 95.

Respondents' only suggestions as to what the "maintenance" requirement might have meant are (1) that possibly relocation could have been effected by claimants of minerals which were not subject to the Leasing Act—an issue which they state was never litigated; (2) that among co-owners of a particular possessory right, the possibility of forfeiture of interest to a co-owner who volunteered assessment work to which the others did not contribute was a sanction encouraging the performance of assessment work. But the possibility of relocation for non-Leasing Act minerals *was* settled, adverse to respondents' suggestion, as early as 1924. *Applicability of the Mining Laws, etc.*, 50 L.D. 650; *Joseph E. McClory*, 50 L.D. 623; Widman, Brightwell & Haggard, *Legal Study of Oil Shale on Public Lands* (1969) 243 and 248 n. 3. The Leasing Act in express terms withdraws from location not just the deposits of the minerals involved but "the lands containing such deposits," 30 U.S.C. 181. The Multiple Mineral Development Act of 1954 was enacted explicitly to remove that barrier, since much of the land concerned had subsequently proved valuable for uranium.[4] *E.g.*, S. Rep. No. 1610, 83d Cong., 2d Sess. (1954) 1 ("[L]and * * * known to be valuable for * * * Leasing Act minerals, could not be located under the mining laws.")

[4] Respondents suggest that their post-154 assessment work served to protect their claims from relocation under the 1954 Act. TOSCO Br. 14 n. 27; 30 U.S.C. 525(c). The argument would be more convincing if the record showed such work to have been done in every year since 1954. From what appears, work was done only to the extent necessary to justify forfeiture and qualify for patent. Supp. 68–69, 75, 81, 89, 93, 102.

Between 1920 and 1954, then, an oil shale claimant could be quite sure that no one would be able to relocate his claim. Once *Virginia-Colorado* had been decided, there was no longer any possibility of loss to an outside claimant through failure to do assessment work and hence no pressure whatsoever to "maintain" it—even though the statute did require maintenance as a condition of continuing validity. Since no outsider could take over the claim, any assessment work that was done was volunteered. That such volunteer work could nonetheless support a forfeiture as between insiders was not decided, as a matter of Colorado state law, until 1961, and then over vigorous and persuasive dissent. *Hamilton* v. *Ertl*, 360 P. 2d 660. In any event, such work does not "maintain" the claim, for the claim merely changes hands within the claimant group; any pressure is not to do the volunteer work, but to contribute ratably to its cost once it has been done.

Thus, while respondents accuse the government of reading too much into the maintenance clause, they in effect would read it out of the statute; for as they construe it, the holder of "valid claims existent on February 25, 1920" was under no greater obligation than he would have been had the reference to maintenance thereafter been completely omitted. As we have shown at length in our main brief, while Congress was undoubtedly anxious to preserve the existing rights of the diligent (and the quoted passage from Congressman Taylor, TOSCO Br. p. 93, proves

no more),[5] it had no purpose to confer the boon of unassailable right on the slothful and the speculator.[6]

[5] Addressing the House 19 years later in support of H.R. 6560 (76th Cong.), on which respondents also rely, TOSCO Br. 110 n. 137, the *same* Congressman Taylor (*Congressional Directory* (1 ed. 1938) 14) stated:

> Mr. Speaker, this applies to about 30,000 acres of oil-shale land, nearly all in my home county. People have been holding it for years and years without complying with the [assessment work] law and without being entitled to it. This is to require them to comply with the law or else let the land revert back to the control of the United States. * * *
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> * * * * *
>
> MR. CASE of South Dakota. Are they not subject to existing laws so that they can be ousted?
>
> MR. TAYLOR of Colorado. No. *The courts have held* that cannot be done. They have been holding these lands for years and paying nothing. They prevent anybody else from getting the land. [84 Cong. Rec. 8729 (1939); emphasis added.]

Of course, as stated in our main brief, p. 64, we cannot deny the existence of such legislative efforts. None of which we are aware, however, would or could have given any effect to the assessment work lapses of 1920–1935 once *Virginia-Colorado* had been decided. *E.g.*, H. Rep. No. 939, 76th Cong., 1st Sess. (1939) 2–3. And since this Court had stated that the claimants had vested property rights in valid claims, serious constitutional doubts may have attended any effort to alter their obligations even prospectively.

[6] The present reading of the assessment work statute leads to other problems. There is no way to quickly and easily determine whether an owner remains seriously interested in developing his claim, or has decided to maintain only a nominal investment. In cases where land is not subject to a withdrawal order, such a determination is far more simple. If the work has not been performed, the claimants' rights are subject to termination on a relocation by others. But on withdrawn lands, where no one has the power to relocate, a claim interest remains valid until the government assembles sufficient evidence to challenge the claim on the basis of abandonment. What was formerly a moderately efficient system permitting termination of rights in unattractive claims, with the moderate cost burden of showing validity imposed on the claim owner, has been

Willingness in these exceptional cases to confer title in return for $500 qualification work and $2.50 per acre hardly shows an intent to confer the practical equivalent of title—an *indefeasible* possessory right—for no consideration at all. Rather, the maintenance requirement must be given at least the minimal content implicit in *Virginia-Colorado,* if not the meaning given to it by the Secretary in the proceedings leading to that case. Otherwise, the Act will have been read not merely to have preserved existing rights, but rather to have created possessory rights of a nature never before encountered under the mining laws—rights entirely inconsistent both with the new policy embodied in the Leasing Act and with the clear congressional anticipation of diligence manifest throughout the legislative history.

3. Respondents take issue with our characterization of the pre-Leasing Act administrative rulings as establishing that where land was withdrawn for public use *without possibility of relocation,* the requirement that claims be maintained by assessment work could be used by public authorities to recapture it for that use. The cases they cite are readily distinguished, however. *Proceedings Against Mining Claims Within the Area of the Boulder Dam Project,* 53 I.D. 228, and *Challenge to Validity of Mining Claims in National Parks,* 53 I.D. 491, were both decided in the shadow of *Krushnic.* And the several homestead cases cited at

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transformed, in the case of withdrawn lands, into an inefficient system which, if other claim requirements have been satisfied, imposes on the government the burden of proving an abandonment case.

Widman, Brightwell & Haggard, *op. cit. supra,* 326–327.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 25

WALTER J. HICKEL, SECRETARY OF THE INTERIOR, PETITIONER

v.

THE OIL SHALE CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S AMENDED REPLY BRIEF

Petitioner files this amended reply brief to replace the reply brief it submitted on January 16, 1970. The postponement of argument in the case has made possible this fuller reply, which both incorporates the previous reply and adds additional material. The prior reply brief may be treated as withdrawn.

I. DIRECT VERSUS COLLATERAL REVIEW

A. Direct review

The respondents' principal contention is that the 1928-1931 administrative decisions are now properly

before this Court on *direct* review. The contention does not withstand examination.

First, respondents correctly stated in their opposition to the government's petition for a writ of certiorari in this Court that "the only issue passed upon by the district court and the court of appeals" was whether those "decisions were rendered in excess of the subject matter jurisdiction of the Department." Brief in Opposition for Respondents The Oil Shale Corp. and Brown, pp. 20-21. The only questions presented by the government in its petition were the issue of subject matter jurisdiction, and the subsidiary question whether *Virginia-Colorado* [1]—on which resolution of that issue depends—was correctly decided. Pet. 2, 15; Reply 2-3. Of course, much of respondents' argument goes to the question whether *Ickes* v. *Virginia-Colorado*, 295 U.S. 639, should be overruled or limited, and as such is entirely responsive; but the direct review proposed is a ground not passed upon by the courts below.

A petition for direct review tendered more than thirty years after the proceeding sought to be reviewed is so extraordinary that no showing of prejudice need be undertaken in opposing it. See *Wetzel* v. *Minnesota Railway Co.*, 169 U.S. 237; *Russell* v. *Todd*, 309 U.S. 280; *Davidson* v. *Grady*, 105 F. 2d 405, 408 (C.A. 5); *Gersten* v. *United States*, 364 F. 2d 850, 852 (Ct. Cl.). In any event, it is not necessary for the government to show specific reliance on any particular decision invalidating particular claims

[1] And, if required, *Krushnic*. Pet. Br. p. 48, n. 21.

in order to establish an equitable basis for denying direct review. In addition to the creation over time of innumerable competing claims to this great expanse of vacant land in general, a development entirely inconsistent with the *exclusive* possessory right respondents claim, there is the wholly separate factor—equally a form of "prejudice" to the government justifying denial of direct review—that the passage of years has obliterated much of the evidence by which the claims might now be judged. *Russell* v. *Todd, supra*, 309 U.S. at 287; *Gabbs Exploration Co.* v. *Udall*, 315 F. 2d 37, 41 (C.A.D.C.), certiorari denied, 375 U.S. 822. It was in anticipation of this loss of evidence that the proceedings were brought when they were. *The Federal Shale Oil Co.*, 53 I.D. 213, 216.[2]

Moreover, while no statute of limitations *now* applies, one arguably did in the years prior to 1962. Until that year, jurisdiction over the Secretary could have been obtained only in the District of Columbia, where a three-year statute of limitations applied to all claims not otherwise provided for. 12 D.C. Code 201. That time had already run, as to all of the claims in this case, even before this Court's decision in *Virginia-Colorado* was announced. Supp. 112, 117, 124, 132, 137, 143. Even if not directly applicable, compare *United States ex rel. Arant* v. *Lane*, 249 U.S.

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[2] The very volume of those proceedings, in addition to substantial documentary evidence (A. 70-78; Supp. 15, 25; *Federal Shale Oil Co., supra*, 53 I.D. at 215), makes clear that only assessment work issues were raised in the *Virginia-Colorado* proceedings.

> Where by the terms of an act, the Secretary is required, upon application of the claimant, to issue a patent * * * Congress by implication confers upon the Secretary the power to make all determinations of law as well as of fact which are essential to the performance of the duty specifically imposed. * * * [at 218-219].

The Secretary is required to patent oil shale claims which were valid on passage of the Act and which have been "thereafter maintained". Accordingly, his duty is as much to decide the legal question what constitutes maintenance and the factual question whether a claim has thus been maintained as it is to decide the requirements for validity and whether in fact a claim is valid. *West*, it may be remembered, was concerned with an action of Secretary Fall facilitating the grant of valuable oil rights to Standard Oil. In finding that he had had no affirmative duty to help Standard Oil in that way, and thus that his action was without effect, the Court stated that "His duty in respect to the land was solely that owed to the United States" [at 219] and that to find that he had the authority he claimed to release the lands would be to make him "an agent rather for relinquishing than for preserving the rights of the United States in the public lands" [at 221]. In the present case, the Secretary measured up to his obligations; in construing and enforcing the maintenance requirement, he acted in full pursuit of the duty he owed to the United States to protect its lands.

II. THE MEANING OF THE MAINTENANCE REQUIREMENT

A. Respondents' suggestion makes the maintenance requirement ineffective.

While our reading of *Virginia-Colorado* may be "*somewhat* tortuous" as compared to outright overruling (Pet. Br. p. 47; emphasis added), it has a virtue which respondents' discussion entirely lacks: it gives some content to the statutory requirement of maintenance. Section 37 of the Leasing Act did not, after all, save existing valid claims in an absolute sense; it saved them only if they were "thereafter maintained." 30 U.S.C. 193. Whether or not it was a sensible conclusion in terms of prior mining law, this Court found that the *Virginia-Colorado* claims were being "maintained" because the claimants had responded to the Secretary's process with an offer to resume assessment work. 295 U.S. at 646. That offer fully distinguishes most if not all of the claims involved in the present case.[4]

Respondents' only suggestions as to what the maintenance requirement might have meant are (1) that possibly relocation could have been effected by claimants of minerals which were not subject to the Leasing Act—an issue which they state was never litigated; and (2) that among co-owners of a particular possessory right, the possibility of forfeiture of inter-

[4] In particular, there was a complete failure of response regarding the Bute, Atlas and Camp Bird claims, which represent 13,760 acres, or about 75 percent of the area subjected to the cancellations involved in this case. Supp. 61, 70, 76, 82, 90, 95.

est to a co-owner who volunteered assessment work to which the others did not contribute was a sanction encouraging the performance of assessment work. But the impossibility of relocation for non-Leasing Act minerals *was* settled, contrary to respondents' suggestion, as early as 1924. *Applicability of the Mining Laws, etc.*, 50 L.D. 650; *Joseph E. McClory*, 50 L.D. 623; Widman, Brightwell & Haggard, *Legal Study of Oil Shale on Public Lands* (1969) 243 and 248 n. 3. The Leasing Act in express terms withdraws from location not just the deposits of the minerals involved but "the lands containing such deposits," 30 U.S.C. 181. The Multiple Mineral Development Act of 1954 was enacted explicitly to remove that barrier, since much of the land concerned had subsequently proved valuable for uranium.[6] *E.g.*, S. Rep. No. 1610, 83d Cong., 2d Sess. (1954) 1 ("[L]and * * * known to be valuable for * * * Leasing Act minerals, could not be located under the mining laws.")

Between 1920 and 1954, then, an oil shale claimant could be quite sure that no one would be able to relocate his claim. Once *Virginia-Colorado* had been decided, there was no longer any possibility of loss to an outside claimant through failure to do assess-

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[6] Respondents suggest that their post-1954 assessment work served to protect their claims from relocation under the 1954 Act. TOSCO Br. 14 n. 27; 30 U.S.C. 525(c). The argument would be more convincing if the record showed such work to have been done in every year since 1954. From what appears, work was done only to the extent necessary to justify forfeiture and qualify for patent. Supp. 68-69, 75, 81, 89, 93, 102.

ment work and hence no pressure whatsoever to "maintain" it—even though the statute did require maintenance as a condition of continuing validity.

Since no outsider could take over the claim, any assessment work that was done was volunteered. That such volunteer work could nonetheless support a forfeiture as between insiders was not decided as a matter of Colorado state law until 1961, and then over vigorous and persuasive dissent. *Hamilton* v. *Ertl*, 146 Colo. 80, 360 P. 2d 660. In any event, such work does not "maintain" the claim, for the claim merely changes hands within the claimant group; any pressure is not to do the volunteer work, but to contribute ratably to its cost once it has been done.

Thus, while respondents accuse the government of reading too much into the maintenance clause, they in effect would read it out of the statute; for as they construe it, the holder of "valid claims existent on February 25, 1920" was under no enforceable maintenance obligation if a discovery had been made. It is as if the reference to 'maintenance thereafter' had been completely omitted. But Congress had no purpose to confer an unassailable right on those who merely held land without developing it. Its willingness to confer title in return for $500 qualification work and $2.50 per acre hardly shows an intent to confer the practical equivalent of title—an *indefeasible* possessory right—for no consideration at all. Rather, the maintenance requirement must be given at least the minimal content implicit in *Virginia-Colorado*. For, under respondents' reading, it not

merely preserved existing rights, but rather created possessory rights of a nature never before encountered in the mining laws—rights entirely inconsistent both with the new policy embodied in the Leasing Act and with the congressional anticipation of diligence manifest throughout the legislative history.[7]

B. By requiring that existing valid claims be "thereafter maintained," Congress understood that annual assessment work would have to be done.

Contrary to respondents' contentions, the available materials show a general understanding in 1920 that locators were required to do assessment work in order to "maintain" their claims. The link had been established with enactment of the assessment work

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[7] The respondents' reading of the assessment work statute leads to other problems.

> There is no way to quickly and easily determine whether an owner remains seriously interested in developing his claim, or has decided to maintain only a nominal investment. In cases where land is not subject to a withdrawal order, such a determination is far more simple. If the work has not been performed, the claimants' rights are subject to termination on a relocation by others. But on withdrawn lands, where no one has the power to relocate, a claim interest remains valid until the government assembles sufficient evidence to challenge the claim on the basis of abandonment. What was formerly a moderately efficient system permitting termination of rights in unattractive claims, with the moderate cost burden of showing validity imposed on the claim owner, has been transformed, in the case of withdrawn lands, into an inefficient system which, if other claim requirements have been satisfied, imposes on the government the burden of proving an abandonment case.

Widman, Brightwell & Haggard, *op. cit. supra*, 326-327.

requirement in 1872, when its proponent, Senator Cole of California, explained it as intended:

> to insure good faith in the working of the mines, to prevent their being held by owners an indefinite length of time without working them * * *, [to] require the miner to use some little diligence and exertion in the working of his mine * * * or else leave it subject to a beneficial use by some other party. [Cong. Globe, 42d Cong., 2d Sess., Pt. 3, 2459 (1872).]

While the government generally disclaimed interest in the performance of assessment work, as such,[8] the failure to do assessment work was often equated with abandonment (in which the government did have an interest) even where lands had not been

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[8] *Procedure to Obtain Patent to Mineral Lands*, 37 L.D. 763. As suggested by the title, these regulations explained in general terms the steps required to obtain patent. One of the requirements was that the applicant show that he had a "possessory right to the premises * * * in virtue of a compliance * * * [with state and local law] and with the mining laws of Congress." 37 L.D. at 766. In stating thereafter that the annual assessment work is "solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts," 37 L.D. at 769, the regulation sought to assure the applicant for patent that even if he had not done assessment work for one or more years prior to his application, his possessory right under the mining laws of Congress was not automatically forfeit; another claimant must have filed a claim during the period of lapse in order to divest him. In so stating, it in no way indicated that the government itself could not initiate contest proceedings, as it did here, when the assessment work was not done, private top-filing was no longer possible, and the land was needed for a public purpose.

withdrawn from location. Widman, Brightwell & Haggard, *op. cit. supra*, 189-193, 349. The proposition that "The [possessory] right is lost only by abandonment, *as by non-performance of the annual labor required*" (*Union Oil Co.* v. *Smith*, 249 U.S. 337, 349; emphasis supplied) was familiar learning in 1920.[9] As to lands which had been withdrawn without possibility of relocation, the government's direct interest in maintenance—*i.e.*, assessment work—was well established by the line of cases developed in our main brief.[10]

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[9] Thus, this Court's remark in *Virginia-Colorado* that the failure to do assessment work had provided "no *ground* for a charge of abandonment," 295 U.S. at 646 (emphasis added), is misleading, if not inconsistent with prior law. What may have been meant was that given both *Krushnic* and the Virginia-Colorado Company's prompt response to the Secretary's challenge, the failure to do assessment work in 1930-1931 could not be considered evidence of abandonment *in that case*. Such a statement, appropriate enough under the particular facts of *Virginia-Colorado*, would not speak to the cases where the work had lapsed before *Krushnic*, when there was widespread understanding that the work was required, or to cases where the Secretary's actions went unopposed or unattended by an offer to resume. To the extent the Court's words appear to go further, they inaccurately characterize the law; "[o]f course, under [the mining law] a mining claim may be abandoned by failure to do the required development work." *Donnelly* v. *United States*, 228 U.S. 243, 267.

[10] Br. 48-57. Without restating that analysis, we note that the cases respondents cite in opposition to it are readily distinguishable. *Proceedings Against Mining Claims Within the Area of the Boulder Dam Project*, 53 I.D. 228, and *Challenge to Validity of Mining Claims in National Parks*, 53 I.D. 491, were both decided in the shadow of *Krushnic*. And the several homestead cases cited at pages 87-88 of the TOSCO

Strikingly, congressional understanding that assessment work had to be done to "maintain" a claim is shown by the legislative history of the very Acts which respondents cite to show that Congress knew how to provide for forfeiture through failure to do assessment work if it wished to (TOSCO Br. 86). Thus, in the only debate on the Act of March 2, 1907, 34 Stat. 1243, governing Alaskan mining claims, its proponent explained its effect as follows:

> *These two propositions are all that are involved in this bill:* First, that $25 of the $100 worth of work shall be done on the roads [instead of

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brief each involved settlers who were in fact on the land, maintaining their claims, but who neglected to comply with technical filing requirements in registering their claims. Like *Krushnic*, those were cases in which the governmental claim depended on the existence of a hypothetical continuing withdrawal interest, which would automatically seize upon the land and retrieve it to the government once any lapse occurred—however minor the lapse, and even if it was repaired before the government actually asserted its interest in the land. That doctrine, like that repudiated in *Krushnic*, would have led to results which were both harsh and unlike the ordinary outcome of private disputation in situations unaffected by withdrawals.

The homestead cases make quite clear, however, that the government would prevail if it could show that at the time of its claim the homesteader was no longer using the land in fact. *James Morris*, 47 L.D. 326, 328-329; *Lizzie Trask*, 39 L.D. 279, 281; *Winfred S. Schmitz*, 38 L.D. 587, 589. So here, we are not arguing that the government is entitled to possession as a "continuing adverse claimant," TOSCO Br. 87; we contend only that where land has been withdrawn from location, assessment work lapses, and *during the period of lapse* (non-maintenance or disuse) the government asserts a specific interest in the land for public use, it is entitled—like any relocator or competing settlor—to obtain the possessory right.

> the mine property proper]; and, second, the filing of proof of the fact of the doing of the work with the recorder of the district. [40 Cong. Rec. 2903 (1906); emphasis added.]

The provision in that Act for automatic forfeiture upon failure to do the work evidently was thought not to be new or strange, but to state existing law—it was agreed that "The general law requires that * * * the locator of a claim shall do a hundred dollars' worth of work a year * * * " [*Id.*, 2902]. Similarly, the Act of January 11, 1915, 38 Stat. 792, validating certain phosphate claims, was meant to benefit those claims which had been worked "in good faith," H.Rep. No. 1020, 63d Cong., 2d Sess. 2 (1914), but not those on which assessment work had not been done annually. This equation between "good faith" and the annual performance of assessment work, again, shows a congressional understanding that the assessment work obligation was mandatory under the law, and is entirely inconsistent with the hypothesis that Congress would permit the perpetuation of claims for an indefinite period without such work being done. True, congressional choice of language in one statute sometimes suggests that the omission of similar language in another was intended to achieve a different result. But where, as here, the more explicit legislation is of minor import and its history shows that the additional language was understood to work no change, the more reasonable conclusion is that the language only shows what Congress understood the requirements of existing law to be. And that understanding, evidently, was that the

performance of assessment work was required to maintain a claim under the Act of 1872.

Legislative materials recently found in Department of Interior files, and set out in the Appendix, *infra*, reflect the same understanding. These consist of correspondence between the Acting Secretary and the Chairmen of the House and Senate conferees after the 1920 Act had gone to conference, in which the Department sought to have Section 37 amended. The proposed amendment would have distinguished between withdrawn and unwithdrawn areas, and would have made clear that as to claims on which discovery had not yet been made, more would be required than mere performance of $100 assessment work annually. The proposal came too late, and no action was taken on it. What is significant here, however, is the assumptions which underlay the correspondence: that under Section 37 as it lay before the Conference Committee, "performance of $100 worth of labor or assessment work annually" *would* be required to maintain a claim. (App., *infra*, at 22, 24, 27, 28-29.)[11] The Department wrote to complain that, in the pre-discovery context, that was not enough.

We do not suggest that the Congress focussed carefully and precisely on this problem, for no one would have imagined that the assessment work obligation would be denied. As respondents agree, the focus was elsewhere, on the problem of crude oil

[11] The letters also support our contention, Br. 58, 62-63, that the lease-exchange provision of the Act, 30 U.S.C. 241(a), was considered to be a major source of relief for current claim-holders. App., *infra*, pp. 21, 23.

and of diligence in prospecting for it. But a fair and objective reading of the legislative background, as set out here and in our main brief, makes clear that the context in which Congress acted was one of general acceptance of the proposition that assessment work had to be done to "maintain" a claim. Its requirement in Section 37 that claims be "maintained" to qualify for patent can mean nothing else. Congress was undoubtedly anxious to preserve the existing rights of the diligent (and the quoted passage from Congressman Taylor, TOSCO Br. p. 93, proves no more).[12] But there is no indication that

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[12] Addressing the House 19 years later in support of H.R. 6560 (76th Cong.), on which respondents also rely, TOSCO Br. 110 n. 137, the *same* Congressman Taylor (*Congressional Directory* (1st ed. 1938) 14) stated:

> Mr. Speaker, this applies to about 30,000 acres of oil-shale land, nearly all in my home county. People have been holding if for years and years without complying with the [assessment work] law and without being entitled to it. This is to require them to comply with the law or else let the land revert back to the control of the United States. * * *
>
> * * * *
>
> MR. CASE of South Dakota. Are they not subject to existing laws so that they can be ousted?
>
> MR. TAYLOR of Colorado. No. *The courts have held* that cannot be done. They have been holding these lands for years and paying nothing. They prevent anybody else from getting the land. [84 Cong. Rec. 8729 (1939); emphasis added.]

There were other indications that *Virginia-Colorado* was viewed as surprising rather than inevitable. See, *e.g.*, Hearings Pursuant to S.Res. 241 (76th Cong.) before a Subcommittee of the Senate Committee on Public Lands and Surveys, 77th Cong., 2d Sess. (1943), Part 5, p. 1954 ("[Oil shale claimants have been occupying the lands] [w]ithout

by withdrawing the lands from relocation it meant to confer on all claimants an indefeasible, indefensible right to possession even thought they might never lift a finger to develop their locations. The contrary holding of *Virginia-Colorado*, "looking largely at cases involving lands open to relocation," [13] ignores the government's valid and specific interests in possession of the land and deprives the statutory maintenance clause of all meaning.[14]

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complying, as I am advised, with the spirit and intent of the law, which was that development work or annual labor should be performed"; Sen. McCarran, Chairman) and p. 1968 ("there must be $100 worth of development work done. That is what the law says. The Supreme Court says in effect that is null and void; that the Act of Congress is of no purpose in that regard, because the development work is not done, and yet the claims are still held in violation of the condition"; Sen. Holman). Of course, as stated in our main brief, p. 64, we cannot deny the existence of legislative efforts to revise *Virginia-Colorado*. None of which we are aware, however, was voted down. None would or could have given any effect to the assessment work lapses of 1920-1935 once *Virginia-Colorado* had been decided. *E.g.*, H. Rep. No. 980, 76th Cong., 1st Sess. (1939) 2-3. And

[13] Widman, Brightwell & Haggard, *op. cit. supra*, at 326.

[14] We note the similar view adopted by the Report of the Public Land Review Commission, *One Third of the Nation's Land*, pp. 124-130 (1970). Compare TOSCO Br. 111-113. In particular, the Commission urges (after setting out the *Virginia-Colorado* interpretation of the statutory obligation) that

> *To prevent speculation and assure diligent effort, an explorer should be required to pay rental, subject to offsetting credits for the actual performance work completed.*
>
> * * * *
>
> *Congress should * * * establish performance requirements designed to assure diligent exploration as a condition of retaining or renewing the exploration right.* [At 126; emphasis in the original.]

III. OTHER ISSUES

Like the issue of the availability to respondents of review of the legal as well as the jurisdictional bases of the assessment work controversies, issues regarding the regularity of the administrative proceedings in *Union Oil* and the effect of the Secretary's post-*Virginia-Colorado* actions have yet to be decided below, and remain open for any remand which might be appropriate upon this Court's decision.

For the reasons shown above and in our principal brief, the decision below was in error and should be reversed.

Respectfully submitted.

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SHIRO KASHIWA,
Assistant Attorney General.

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Assistant to the Solicitor General.

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Attorneys.

AUGUST 1970.

APPENDIX

DEPARTMENT OF THE INTERIOR
WASHINGTON

Dec. 3, 1919

My dear Senator:

Will you please direct the attention of the conferees on S. 2775 to the provisions of section 37 of said bill as passed by the Senate and as passed with amendments by the House of Representatives?

The Commissioner of the General Land Office and other officers of this Department are somewhat uncertain as to its scope and effect, and fear that such a construction might be placed upon it as would almost nullify the leasing provision of the bill, deprive the States and United States of the revenue which it is thought will arise from the leasing of the mineral deposits in question, and permit large areas of public lands to be held indefinitely by nominal compliance with the provisions of the old general mining laws. I refer particularly to that portion of the section which, after repealing the general mining laws in so far as they apply to the deposits named therein, reads as follows:

> * * * except as to valid claims existent at the date of the passage of this act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery. * * *

While I believe the language in question does not apply or was not intended to apply to claims in withdrawn areas, particularly in view of the ample provision for relief as to such claims provided in sections 18 and 19, still it is susceptible of the construction above indicated. But even if this provision of section 37 is construed to apply only to *un*withdrawn lands, it seems to me that it is still objectionable, in that it

makes no provision for diligence in perfecting the claims and fixes no time limit within which the claims shall be perfected. In other words, may not mere paper locations be held indefinitely from use and development by the performance of $100 worth of labor or assessment work upon each claim annually?

I think that neither House had any such purpose in mind in enacting the legislation, but the possible situation created by the language of the section is so serious that I am writing to call it to your attention with the suggestion that section 37 be so amended and limited as to protect only locations on *un*withdrawn lands where the claimants thereof are, at the date of passage of the act, in diligent prosecution of work leading to discovery, and who continue such diligence to discovery. Permit me to suggest, therefore, that the section be amended by omitting the words "including discovery" in line 5, page 41, of the "Comparative Print", and inserting after the word "laws", the following proviso:

> *Provided*, That the rights of any person who, at the date of the approval of this act, is a *bona fide* occupant or claimant under the mining laws heretofore existing, of unwithdrawn oil or gas lands, and who, at such date, is in the diligent prosecution of work leading to discovery of such minerals and who continues such diligence to discovery, may perfect and acquire title to such claims under such mining laws.

I am addressing a similar letter to Mr. Sinnott, Chairman of the House Conferees.

Cordially yours,

(Signed) ALEXANDER T. VOGELSANG
Acting Secretary

Hon. Reed Smoot,
United States Senate.

DEPARTMENT OF THE INTERIOR
WASHINGTON

Dec. 3, 1919

My dear Mr. Sinnott:

Will you please direct the attention of the conferees on S. 2775 to the provisions of section 37 of said bill as passed by the Senate and as passed with amendments by the House of Representatives?

The Commissioner of the General Land Office and other officers of this Department are somewhat uncertain as to its scope and effect, and fear that such a construction might be placed upon it as would almost nullify the leasing provision of the bill, deprive the States and United States of the revenue which it is thought will arise from the leasing of the mineral deposits in question, and permit large areas of public lands to be held indefinitely by nominal compliance with the provisions of the old general mining laws. I refer particularly to that portion of the section which, after repealing the general mining laws in so far as they apply to the deposits named therein, reads as follows:

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I am addressing a similar letter to Mr. Smoot, Chairman of the Senate Conferees.

Cordially yours,

(Signed) ALEXANDER T. VOGELSANG
Acting Secretary

Hon. N. J. Sinnott,
House of Representatives

Reed Smoot, Utah,
Chairman.

UNITED STATES SENATE,
COMMITTEE ON PUBLIC LANDS.

December 4, 1919.

Hon. Alexander T. Vogelsang,
Acting Secretary, Department of the Interior,
Washington, D.C.

Dear Mr. Vogelsang:

I am in receipt of your letter of December 3, 1919, suggesting a certain amendment to section 37 of the Oil Leasing Bill.

In answer will state that the suggested change is not in conference, therefore it is doubtful if the suggestion can be complied with. I shall call it to the attention of the conferees, however.

With best wishes, I remain,

Yours truly,

/s/ Reed Smoot

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE PUBLIC LANDS
WASHINGTON, D.C.

Dec. 3, 1919.

Hon. Alexander T. Vogelsang,
Acting Secretary of the Interior,
Washington, D. C.

My dear Mr. Vogelsang:

I am just in receipt of yours of December 3rd with reference to Section 37 of S. 2775, the oil leasing bill.

I shall be glad to give careful consideration to your views and call the same to the attention of the Conference Committee. I do not know that I just understand your reference in the first paragraph on page 2, to the $100 worth of labor or assessment work. Do you have in mind assessment work under the state laws or under the federal statutes? As I understand, under the federal statute assessment work is required only after discovery.

With kindest regards, I remain

Very truly yours,

/s/ N. J. Sinnott

S/C

[Dec. 4, 1919 Answered]

DEPARTMENT OF THE INTERIOR
WASHINGTON

Dec. 4, 1919

Hon. N. J. Sinnott,
Chairman Committee on Public Lands,
House of Representatives.

My dear Mr. Sinnott:

I have yours of December 3, 1919, relative to my letter of the same date, regarding section 37 of S. 2775, the oil-leasing bill, and note your comment with respect to that part of page 2 of my letter which suggested that possibly under the section as it now stands the land covered by paper locations might be held indefinitely from use and development by the performance of $100 worth of labor or assessment work upon each claim annually.

You are correct in the statement that assessment work under the Federal statutes is contemplated and required only after the discovery of mineral, for the reason that the Federal statutes do not recognize any location as valid until mineral has been discovered. However, section 37 of S. 2775 would change this, because it provides that claims may be held under the mining laws, notwithstanding the enactment of the leasing law, and perfected under such laws, "including discovery." This phrase, if enacted, would modify the requirements of the general mining laws as to discovery as to this class of claims and permit them to be maintained prior to discovery, thus giving ground for the contention at least that such claims, prior to discovery, might be held by the performance

of $100 worth of labor or work annually. Furthermore, after discovery they could undoubtedly be held indefinitely by the performance of that amount of assessment work, without production or without payment of the $2.50 per acre required in connection with an application for patent under the general mining laws.

The amendment suggested by me was designed to require diligence in development and discovery work, and this, as you are aware, under the Pickett Act as construed by this Department and by the courts, means very much more in the way of continuity and amount of work than the requirements as to labor now contained in either Federal or State statutes.

Cordially yours,

(Signed) ALEXANDER T. VOGELSANG
Acting Secretary

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